

NO. 44561-1-II
(consolidated with 44621-9-II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MYKELL BRU,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

CORRECTED
OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in refusing to grant defense counsel's request to continue the trial after the prosecutor disclosed new DNA evidence and endorsed a DNA expert witness after the case was called ready and less than two working days before the start of trial.

2. The trial court's denial of defense counsel's request to continue the trial deprived Mr. Bru of his state and federal constitutional right to adequate representation by a prepared defense counsel.

3. The trial court's refusal to grant defense counsel's requested continuance of the trial denied Mr. Bru due process.

4. The trial court abused its discretion in denying Mr. Bru's post-conviction motion for a new trial.

5. The sentencing court erred in ordering Mr. Bru to pay a \$1,500 fee for "court appointed attorney and trial per diem."

6. Mr. Bru adopts and incorporates Mr. Mattila's Assignment of Error No. 6.

7. Mr. Bru adopts and incorporates Mr. Mattila's Assignment of Error No. 7.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in denying defense counsel's request to continue the trial when the prosecutor only disclosed DNA evidence and endorsed a DNA expert witness after the case was called ready for trial, the disclosure and endorsement was made less than 48 working hours before the trial started, and defense counsel acknowledged he could not effectively address the DNA evidence without first consulting with his own DNA expert?

2. Did the denial of the trial continuance deny Mr. Bru of his right to adequately prepared defense counsel and his right to due process?

3. Did the trial court abuse its discretion when it refused to grant Mr. Bru a new trial?

4. The superior court's sentencing authority is purely statutory. RCW 10.01.160 permits the court to order a convicted defendant to pay a jury fee, but the defendant cannot be ordered to pay for the expenses inherent in providing a constitutionally-guaranteed jury trial. Did the sentencing court exceed its statutory authority by ordering Mr. Bru to pay a "trial per diem" fee of \$1,500 in addition to a separate jury demand fee because he exercised his constitutional right to a trial?

5. Mr. Bru adopts and incorporates Issue II set forth in Mr. Mattila's Opening Brief.

6. Mr. Bru adopts and incorporates Issue IV set forth in Mr. Mattila's Opening Brief.

C. STATEMENT OF THE CASE

1. Procedural overview

Mykell Bru and co-defendant Jacob Mattila¹ were tried jointly before a jury. 1ARP; 1BRP; 2ARP; 2BRP; 3RP. The State charged Mr. Bru with three crimes by an Amended Information filed on February 8 and clarified in a Second Amended Information filed on February 13. CP 1-5, 6-10. The jury convicted Mr. Bru of residential burglary under count three and acquitted him of burglary in the first degree and theft of a firearm under counts nine and ten. CP 11, 12, 13.

The court sentenced Mr. Bru to 14 months in prison and found that he could pay the various legal financial obligations the court imposed upon conviction. CP 16. Among the legal financial obligations imposed, none of which were objected to, was a \$1,500 fee for "court appointed attorney and trial per diem, if applicable." CP 18; 3RP 726-51.

Mr. Bru appeals all portions of his Judgment and Sentence. CP 28-42.

¹ Mr. Mattila's last name is sometimes spelled "Matilla" in the record. It is unclear which is the correct spelling.

2. Motion to continue trial date

Mykell Bru was arraigned on November 20, 2012. Supplemental Designation of Clerk's Papers (Supp. CP) 50. The court set a December 17, 2012, trial date. Supp. CP 50. On December 11, the State filed a motion to amend Mr. Bru's Information to add a fourth co-defendant. Supp. CP 51-52. In response, Mr. Bru filed a motion to continue the trial date so defense counsel had adequate time to prepare for the addition. Supp. CP 54-55. On December 13, the court granted the continuance and reset the trial date to February 11, 2103.² Supp. CP 53.

As of the February 7 readiness hearing, Mr. Bru and Mr. Mattila were still joined for trial.³ There was an impression among the prosecutor and defense counsel that Mr. Bru's and Mr. Mattila's joined case would be continued by agreement. 1ARP 103-04. However, at the afternoon readiness hearing, the defense called the case ready. Id. At that hearing, for the first time, the prosecutor told the defendants the State was testing a cigarette from one of the burglaries and expected to have the test results soon.. 1ARP 97.

At that point, Mr. Bru was still charged under his original Information filed on November 13, 2012. Supp. DCP, Information (sub. nom. 9). The original Information charged Mr. Bru with three counts of

² Mr. Bru signed a speedy trial waiver. Supp. CP 56.

³ It is unclear what happened to the other co-defendant who had been joined for trial.

burglary in the first degree, one count of residential burglary, three counts of theft of a firearm, and one count of theft in the first degree. Id.

Late afternoon on Thursday, February 7, the prosecutor sent Mr. Bru's counsel a copy of a Washington State Patrol Crime Lab Report. The report was dated February 7. Supp. CP 65-67. There were agency police report numbers on the Lab Report but it is unclear if the agency numbers comport with the police reports for the various crimes alleged committed by Mr. Bru and Mr. Mattila. One of the DNA profiles for a cigarette matched Mr. Bru's DNA profile. Supp. CP 66.

On Friday, February 8, the State amended its witness list to add Washington State Patrol Crime Lab Forensic Scientist Caron Pruiett. 1ARP 97. Supp. DCP 59. The previous amended witness list, filed January 18, did not include Ms. Pruiett. Supp. CP 57-58.

Also on February 8, the prosecutor successfully moved ex parte to dismiss counts 1, 2, 5, 6, and 7 without prejudice from Mr. Bru's November 13 Information. Supp. CP 46-4, 61-62. The State filed an Amended Information the same day. It left Mr. Bru charged as follows: Count 3, Residential Burglary (Mock residence); Count 9, Burglary in the First Degree (Songer residence); and Count 10, Theft of a Firearm (Songer's gun). CP 2-3.

The trial began on Monday, February 11. Before selecting a jury, Mr. Bru's counsel stated the following:

MR. BENNETT:⁴ Your honor, just one thing. I got a copy Thursday of the lab test, and I am assuming the State is not going to be offering that in this case here today because it pertains to another burglary, not the burglary that we're talking about. So I'd like to clarify that before we get started.

1ARP 97.

The prosecutor indicated the lab test did apply to a remaining burglary charge, and she had put that on the record on Thursday, February 7 when the case was called ready. It was, she acknowledged "a bit confusing" because there were two cigarettes collected during the course of the police investigation into various burglaries and "one of [the cigarettes] is from the Mock home, which Mr. Bru is so charged with."⁵

1ARP 97. The prosecutor anticipated that Washington State Patrol Forensic Scientist Caron Pruiett, a witness she endorsed for the first time on Friday, February 8, would testify there was DNA on the cigarette and it was a match for Mr. Bru. 1ARP 97-98.

Defense counsel expressed concern for the late Thursday revelation that the State was testing a cigarette:

I had no knowledge of it, and I was not aware of it. I was not expecting it. So based on that, this – if this lab report pertains to

⁴ Attorney Arthur Bennett represented Mr. Bru.

⁵ It might also have been a bit confusing because as of February 7, Mr. Bru was still charged under the original Information with five burglaries. Supp. CP 46-49.

this case, I'll have to ask for a continuance so I can respond to that and research it. I had no knowledge and it was 11:59 hour when – when I got it. So, that's very important to our case.

1ARP 98.

The court tentatively denied the requested continuance and wanted to move forward with jury selection. 1ARP 98. Other than wanting to move forward with the trial, the court provided no explanation for denying defense counsel's request for a continuance. 1ARP 98. The court assured defense counsel he "will for sure arrange, if you want time to be able to talk with the Washington State Patrol Crime Lab person ahead of time, make sure that happens." 1ARP 98.

Defense counsel again asked that the case be continued.

MR. BENNETT: I got [the lab report] – I think we got it that night or something, and she didn't say what it was. She said one of – or the cigarette was being tested or something, but we got the lab report after that. It's signed 2/07, 2/07/13 by the – by the expert. So, didn't know about it at the hearing. Obviously, it's important to our case, so based on that, I'm just asking for a continuance. I'm not a DNA expert at all.

1ARP 99.

The prosecutor added additional information to the record. She said she had been told the trial was going to be continued. She was called into court on Thursday afternoon to learn that both defendants were calling the case ready. So she put on the record that a cigarette had been seized at the burglaries and it was being tested and a report was expected

by the end of the week, that it was expected to be Mr. Bru's DNA and that Mr. Bru still wanted to go forward. She learned before the end of the court day that the DNA was a match for Mr. Bru. She immediately left a message for defense counsel on his voicemail and emailed him and "got him the report as soon as we got it." 1ARP 99-100. She understood that as of Friday, Mr. Bru's counsel wanted a continuance but that he did not appear at 2:30 to address that. The prosecutor objected to a continuance and that would be the only remedy as "suppression is not the remedy." 1ARP 100.

The prosecutor did not explain how she came to understand that defense counsel wanted a continuance as of Friday, where they were supposed to meet at 2:30, or whether defense counsel knew of the meeting.⁶

The prosecutor said she could not go forward on the charge without the cigarette as "that's almost the only evidence I have that he was involved in that burglary, so it's a huge thing." 1ARP 100.

Defense counsel noted that in the police reports the cigarette was seized four months ago along with a lot of other stuff, his file was six inches thick with discovery, and that there were numerous burglaries to include allegations that were not currently before the court. 1ARP 100-01.

⁶ A review of the superior court file indicates that no hearing on the case was noted up in court for February 8 at 2:30 p.m.

Although there was reference to a cigarette in the reports, the cigarette DNA evidence was first produced to the defense the evening of February 7 and he had no idea it was coming and he “didn’t know what they were talking about.” 1ARP 101. He needed time to respond to the new evidence that was filed at the eleventh hour, fifty-ninth minute. 1ARP 101.

The court declined to continue the case:

JUDGE COLLIER: And I would note, this is a Department 8 case. I’m covering it because my trials went off. And I would note, just for the record, consistent with what [the prosecutor] indicated – because we are all covering for Department 8 right now when she’s out on medical leave, that this case was not expected to be called ready, that it was going to be a – an agreed continuance. I would note as well [the prosecutor] was in with me on another case when she did get called down to the pit because Defense was calling the case ready that the State did not think was being called ready. We now fast-forward a few days and we are here, you know, in the afternoon of Day 1. I’ll allow and arrange for you to be able to test – to testify. Not to testify. But to question the State Crime Lab individual ahead of time, interview them, but we’re going to continue.

1ARP 101-02.

In a final effort to have the case continued, defense counsel explained that his job as defense counsel was to do more than just ask the State’s expert what she was going to say. He needed his own expert to be able to respond to the State Patrol report. 1ARP 103. He also clarified as of the morning of February 7, Mr. Bru wanted to continue the trial but by

the afternoon he had changed his mind and wanted to go forward with the Monday trial. 1ARP 103-04. The court responded.

JUDGE COLLIER: And that's why we're here. Everyone was agreeing to the continuance, and then Thursday afternoon, the continuance was off. We scrambled around to get this case covered with me. We're going forward, because we're going forward at the request of the Defense.

1ARP 104.

3. Trial testimony

On the afternoon of October 16, 2012, at least one person broke into the Mock home in Clark County. 1BRP 242, 271, 282. While in the residence, the intruder opened cupboards, dismantled a closet, and pulled out nightstand drawers. 1BRP 283. The intruder placed jewelry, a camera, a key chain, a cigar box, and other items from the home on a dog bed by the back door. 1BRP 284.

The burglary was interrupted because the Mock's ten-year old daughter, Paityn, was home by herself when at least one stranger entered the home. 1BRP 268-69, 271. Paityn called her mother and the police to tell them a stranger was in the home. 1BRP 270-71.

The police responded and found Mr. Matilla parked nearby and arrested him. 1BRP 243, 245, 251. Mr. Matilla told the police he was the lookout for two other people who went into the home to burglarize it. 1BRP 251-52. He did not testify as to the identity of the people who

actually went into the home.⁷ No one who went into the home was caught. 1BRP 246.

After the police concluded their investigation at the Mock home, Ms. Mock found a cigarette butt on her master bathroom floor. Neither she nor her husband smoked. The house had been professionally cleaned the day before the burglary. 1BRP 286-88. There was no reason for the cigarette butt to be in her home so Ms. Mock collected it into a plastic baggie and kept it until a police detective returned from vacation and retrieved it from her. 1BRP 252-54, 287. The butt was placed into evidence and later routed to the Washington State Patrol for testing. 1BRP 257.

Forensic Scientist Caron Pruiett testified at trial about testing the cigarette butt from the Mock home for DNA comparison purposes.⁸ She concluded that the DNA from the butt matched the DNA sample from Mr. Bru. The likelihood that it was anyone else's DNA amongst the United States population was 1 in 2.1 sextillion. 2ARP 407-13. In his cross-examination of Forensic Scientist Pruiett, defense counsel tried to instill doubt into the validity of the DNA testing by suggesting that

⁷ Deputy Yakhour read Mr. Matilla's statements to the jury from a prepared transcript. 2BRP 492-516. The transcript had been redacted such that Mr. Matilla did not implicate co-defendants under *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

⁸ She received all of the material for testing – to include two cigarette butts - on January 4, 2013. 2ARP 420.

contamination could have occurred because of mishandling of the DNA evidence. 2ARP 424-25.

The DNA test result was the only evidence linking Mr. Bru to the Mock home.

4. Post trial motion for a new trial.

After Mr. Bru was convicted, defense counsel filed a timely Motion for a New Trial under CrR 7.5(a)(5),⁹ CrR 7.5(a)(6),¹⁰ and CrR 7.5(a)(8);¹¹ Supp. CP 63-74.

The court heard and denied the motion before sentencing Mr. Bru. 3RP 740-42.

D. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO GRANT DEFENSE COUNSEL A CONTINUANCE SO HE COULD BE ADEQUATELY PREPARED TO EXAMINE THE STATE'S DNA EXPERT DENIED MR. BRU HIS RIGHT TO COUNSEL AND DUE PROCESS.

The trial court abused its discretion when it refused to grant defense counsel's motion to continue the trial. The failure to grant the continuance deprived defense counsel the ability to consult with a DNA expert and to prepare to respond to the DNA evidence the State endorsed

⁹ Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial

¹⁰ Error of law occurring at the trial and objected to at the time by the defendant

¹¹ That substantial justice has not been done

less than two work days before the start of Mr. Bru's trial. Defense counsel's inability to adequately prepare for trial denied Mr. Bru effective counsel and due process. This court should reverse Mr. Bru's residential burglary conviction.

- a. The trial court must use sound discretion when ruling on a defense counsel's motion to continue a trial.

In criminal cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272-273, 87 P.3d 1169 (2004). The trial court's decision to grant or deny motions for continuances are reviewed for abuse of discretion. *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995); *Skagit Ry. & Lumber Co. v. Cole*, 2 Wn. 57, 62, 25 P. 1077 (1891). A trial court's decision denying a continuance will not be disturbed unless the appellant makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959)).

In exercising discretion to deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due

process, materiality, and maintenance of orderly procedure. *Downing*, 151 Wn.2d at 273; *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

- b. The trial court abuses its discretion when it refuses to allow defense counsel adequate time to prepare for trial.

A criminal defendant is entitled to the effective assistance of counsel at trial. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. Amend VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel” The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

A defendant’s right to counsel includes the allowance of sufficient opportunity for his counsel to prepare for trial. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976); *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). The constitutional right to have the assistance of counsel, Art. I, § 22,

carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law in contravention of Art. I, § 3 of the state constitution. *State v. Sain*, 34 Wn. App. 553, 558, 663 P.2d 493 (1983). Art. I, § 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.” The right to counsel may also include defense counsel being given the opportunity to obtain the advice of experts. *State v. Cunningham*, 18 Wn. App. 517, 523, 569 P.2d 1211 (1977).

Our appellate courts recognize a trial court does not abuse its discretion when it continues a trial in order to allow counsel adequate time to prepare for trial. *State v. Flinn*, 154 Wn.2d 193, 199-200, 110 P.3d 748 (2005) (prosecution given additional time to prepare for defendant’s diminished capacity defense); *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (recognizing defense counsel could not effectively represent defendant without more time given complexity and length of case). It is well established that a trial court may grant a continuance even over a defendant’s objection to allow counsel additional time to prepare for trial. *Id.*

A failure to produce evidence or identify witnesses in a timely manner is “appropriately remedied by continuing the trial to give the non-violating party time to interview a new witness or prepare to address new

evidence.” *State v. Hutchinson*, 135 Wn.2d 863, 881, 958 P.2d 1061 (1998); See, e.g., *State v. Linden*, 89 Wn. App. 184, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018 (1998) (holding trial court acted within its discretion when granting continuance to defense for prosecution's late disclosure of information); See also CrR 4.7(h)(7)(i).

- c. The trial court abused its discretion when it refused to give defense counsel adequate time to investigate the newly disclosed DNA evidence and to prepare to cross-examine the State's DNA expert.

The trial court abused its discretion when it failed to consider trial counsel's need to be adequately prepared for trial over the inconvenience of the case having been called ready for trial by Mr. Bru after the State disclosed it was testing a cigarette from one of the burglaries. 1ARP 97. Defense counsel did not actually receive a copy of the Washington State Patrol DNA lab report until after the case was called ready. The State's first endorsement of its expert witness was not until the Friday before the Monday trial.

When the trial got underway on Monday, defense counsel was not even sure which of the many burglaries Mr. Bru was alleged to have committed, or was being investigated for having committed, the DNA evidence even applied to. 1ARP 97. The prosecutor acknowledged that might be confusing as there was evidence of two different cigarettes in the

six inches of police reports in defense counsel's possession. Adding to the confusion was the prosecutor's Friday ex parte dismissal without prejudice of five counts from Mr. Bru's Information. Supp. CP 61-62.

As soon as defense counsel was made aware the DNA evidence applied to the burglary at the Mock home, he freely acknowledged he was not ready for trial as he was not a DNA expert himself and needed to consult with an expert to be adequately prepared for trial. 1ARP 98-99. The trial court's remedy of giving defense counsel time to question the DNA expert before she testified did nothing to shore up the disparity in knowledge between the non-DNA expert defense counsel and the expert forensic scientist with her bachelor's degree in microbiology, her master's degree in veterinary science, and over six years of work experience as a forensic scientist. 2ARP 397-98. Defense counsel did not know where to begin in understanding the DNA evidence.

The DNA evidence was essential for the State's case. Without it, the State had no evidence putting Mr. Bru in the Mock home or otherwise showing any involvement in the burglary. 1ARP 100. It was equally essential for Mr. Bru to be represented by counsel who understood the evidence and had some ability to challenge it. It should not be up to the State, through the timing of disclosure of evidence, to dictate the effectiveness of defense counsel.

Under these facts, reversal is required. Mr. Bru is entitled to a new trial with adequately prepared defense counsel.

2. THE SENTENCING COURT LACKED STATUTORY AUTHORITY TO ORDER MR. BRU TO PAY A \$1,500 TRIAL PER DIEM FEE.

The sentencing court obligated Mr. Bru to pay \$3,450 in legal financial obligations, which did not include restitution. CP 18-19. The Judgment and Sentence shows that \$1,500 of the fees is “for court appointed attorney and trial per diem.” CP 18. While fees for court appointed counsel are authorized by law, RCW 9.94A.030(30), trial per diem is not. As the \$1,500 attorney and trial per diem are indivisible, this court should remand to the sentencing court to strike the unauthorized portion attributed to the “trial per diem.”

The superior court’s power to sentence a felony offender derives from the Sentencing Reform Act (SRA). RCW 9.94A.505(1); *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 782 (2007) (court has sentencing authority only as approved by Legislature). The defendant may challenge a sentence that does not comply with the SRA for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

RCW 9.94A.505 provides that the court “shall” impose a sentence “as provided in the following sections and as applicable to the case.”

RCW 9.94A.505(2)(a). RCW 9.94A.760(1) permits the court to order court costs and other assessments “required by law.” RCW 10.01.160 permits the imposition of court costs on a convicted defendant only if “the defendant is or will be able to pay them.” RCW 10.01.160(1). RCW 10.01.160(2) specifically limits costs to expenses actually incurred in prosecuting the defendant and not costs inherent in providing a jury trial. See U.S. Const. Amends VI; Const. Art. I, §§ 21, 22.

Costs shall be limited to expenses specifically incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

RCW 10.01.160(2) (emphasis added). The court may, however, order the defendant to pay a jury trial fee, which cannot exceed \$250 for a 12-person jury. *Id.*; RCW 10.46.190; RCW 36.18.016(3)(b); *State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012).

The trial court, however, ordered Mr. Bru to pay both a \$250 jury demand fee and a “trial per diem” fee for up to \$1,500 for a four-day jury trial. CP 18; RP Volumes 1A, 1B, 2A, 2B, and 3. The Judgment and Sentence provides no statutory authority for the trial per diem fee. CP 18.

The State did not provide the basis for this financial obligation and it was not discussed at sentencing. 3RP 726-51.

There is no apparent statutory authority for the \$1,500 indivisible trial per diem portion of the “fees for court appointed attorney and trial per diem.” CP 18. Moreover, a “trial per diem” fee appears to be for the costs of Mr. Bru’s constitutionally-guaranteed trial. Mr. Bru’s case must be remanded to the sentencing court to strike the fee. *Bunch*, 168 Wn. App. at 633-34; see *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (vacating assessment of interpreter costs as violation of defendant’s right to equal protection).

3. MR. BRU ADOPTS AND INCORPORATES THE ARGUMENT SET FORTH IN ARGUMENT II OF MR. MATTILA'S OPENING BRIEF.

Pursuant to RAP 10.1, Mr. Bru adopts and incorporates Argument Issue II of Mr. Mattila’s Opening Brief.

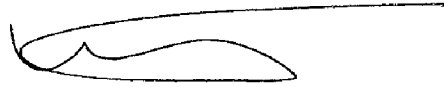
4. MR. BRU ADOPTS AND INCORPORATES THE ARGUMENT SET FORTH IN ARGUMENT IV OF MR. MATTILA'S OPENING BRIEF.

Pursuant to RAP 10.1, Mr. Bru adopts and incorporates Argument IV of Mr. Mattila’s Opening Brief.

E. CONCLUSION

Because the trial court erred in denying his motion to continue the trial, Mr. Bru's conviction should be reversed and remanded for retrial. In the alternative, Mr. Bru's case should be remanded to the sentencing court to strike the "trial per diem."

Dated this 14th day of October 2013.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

LISA E. TABBUT, WSBA #21344
Attorney for Mykell Bru

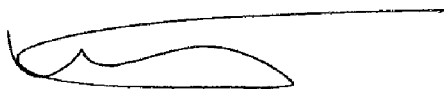
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) Backlund and Mistry, counsel for co-appellate Jacob Mattila, at backlundmistry@gmail.com; and (3) the Court of Appeals, Division II; and (3) I mailed it to Mykell Bru, Clark County Jail/CFN#189006, PO Box 1147, Vancouver, WA 98666.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 14, 2013, in Longview, Washington.

A handwritten signature in black ink, consisting of a long horizontal stroke followed by a loop and a small upward flick.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Mykell Bru

COWLITZ COUNTY ASSIGNED COUNSEL

October 14, 2013 - 2:43 PM

Transmittal Letter

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Appellant's Corrected Opening Brief

Sender Name: Lisa E Tabbut - Email: **lisa.tabbut@comcast.net**

A copy of this document has been emailed to the following addresses:

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